

AMENDED IN ASSEMBLY JULY 2, 2002

AMENDED IN SENATE MAY 6, 2002

AMENDED IN SENATE MAY 1, 2002

SENATE BILL

No. 1766

Introduced by Senator Ortiz

February 21, 2002

An act to add Division 8.6 (commencing with Section 22965) to the Business and Professions Code, *and to add Section 1021.10 to the Code of Civil Procedure*, relating to tobacco products.

LEGISLATIVE COUNSEL'S DIGEST

SB 1766, as amended, Ortiz. Tobacco products: sales.

Existing law, known as the Stop Tobacco Access to Kids Enforcement (STAKE) Act, requires the State Department of Health Services to establish and administer a program to reduce the availability of tobacco products to minors. The STAKE Act prescribes certain civil penalties for violations of its provisions, which the department is required to enforce.

Existing law imposes taxes at specified rates upon the distribution of cigarettes and tobacco products within the state. Existing law provides that any person who knowingly violates these provisions is guilty of a misdemeanor and may be subject to a fine.

This bill would require each retail sale of ~~a tobacco product~~ *cigarettes* in the state to be a vendor-assisted, face-to-face sale. The bill would define a "face-to-face sale" as a sale in which the buyer and seller or the seller's employee or agent are within each other's physical presence at the time of the sale, and would exclude from this definition any transaction that is conducted by mail order, the Internet, telephone, or

any other anonymous transaction ~~method, except for method.~~ *The bill would not prohibit any lawful sales that occur by means of a cigarette vending machine. This bill would also provide that a person may engage in a non-face-to-face sale of a tobacco product cigarettes if the seller complies with specified requirements concerning, among other things, verification of the age of the purchaser payment of applicable state taxes.*

This bill would provide that any person who violates its provisions is subject to specified civil penalties, and that *the Attorney General or a city attorney, county counsel, or district attorney may bring a civil action to enforce the provisions of the bill.*

Existing law provides that except as expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs, including attorney fees when authorized by contract, statute, or law, in any action or proceeding.

Existing federal law, known as the Jenkins Act, requires any person that sells or transfers in interstate commerce cigarettes into a state that taxes the sale or use of cigarettes to file certain information with the tobacco tax administrator of that state.

This bill would provide that in an action in the name of the people of the state against any person for failure to comply with the Jenkins Act the court, to the extent permitted under federal law, shall award fees and costs, including reasonable attorney's fees, to the people if the people succeed on any claim to enforce the Jenkins Act.

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
 2 following:
 3 ~~(a) Despite the expenditure of very substantial resources on~~
 4 ~~limiting youth access to tobacco and on educational efforts to~~
 5 ~~diminish youth demand, the purchase of tobacco products by~~
 6 ~~children remains a serious public health problem in this state.~~
 7 ~~Although existing laws deter children from gaining access to~~
 8 ~~cigarettes through vending machines, market sampling, and sales~~
 9 ~~by retailers, a significant number of children are able to~~
 10 ~~circumvent existing state statutes by purchasing cigarettes from~~
 11 ~~direct sellers over the Internet or through the mail.~~

~~(b)–~~

(a) The people of California have established special tobacco surtaxes intended to diminish the demand for tobacco products, particularly among children and minors. Tobacco surtaxes are intended to increase the price of tobacco to discourage its use, diminish the public costs associated with tobacco use, finance motivational and tobacco cessation programs to help tobacco users quit, and provide medical services to communities with elevated levels of tobacco-related injuries. Internet and mail-order sales of tobacco by interstate sellers that evade California’s taxes subvert important public health policies and are contrary to the interest and public health of the people of California.

~~(c)–~~

(b) It is the intent of the Legislature in enacting this act to:

~~(1) Prevent children from gaining access to tobacco products.~~

~~(2) Deter adults and children from buying tobacco products by raising the cost of cigarettes through the enforcement of excise taxes; to facilitate the collection of all applicable state surtaxes and sales or use taxes on cigarettes sold to residents of California over the Internet or by mail order.~~

SEC. 2. Division 8.6 (commencing with Section 22965) is added to the Business and Professions Code, to read:

DIVISION 8.6. RETAIL SALES OF TOBACCO

22965. (a) Except as provided in subdivision (c), no person may engage in a retail sale of ~~a tobacco product~~ *cigarettes* in California unless the sale is a vendor-assisted, face-to-face sale.

(b) For the purposes of this section, “face-to-face sale” means a sale in which the purchaser is in the physical presence of the seller or the seller’s employee or agent at the time of the sale. A face-to-face sale does not include any transaction conducted by mail order, the Internet, telephone, or any other anonymous transaction method in which the buyer is not in the seller’s physical presence or the physical presence of the seller’s employee or agent at the time of the sale.

(c) A person may engage in a non-face-to-face sale of ~~a tobacco product to a person in California provided that the seller complies with all of the following:~~

~~(1) Before completing any non-face-to-face sale of a tobacco product, the seller shall require the purchaser to submit a copy of a valid form of government identification and an attestation signed by the purchaser that he or she is 18 years of age or older and that the government identification truly and correctly identifies the purchaser and the purchaser's current address. For the purposes of this subdivision, a valid form of government identification includes a driver's license, state identification card, passport, or military identification. In addition, the seller shall attempt to match the name, address, and date of birth provided by the purchaser to information contained in records in a data base of individuals whose age has been verified to be 18 years or older. An appropriate data base includes information based on public records.~~

~~(2) If the seller is unable to verify that the purchaser is 18 years of age or older pursuant to paragraph (1), the seller shall not sell any tobacco products to the consumer.~~

~~(3) The seller shall impose a two-carton minimum on each order of tobacco products, and shall require payment for the purchase of any tobacco product to be made by personal check of the purchaser or the purchaser's credit card. No money order or cash payment shall be received or permitted.~~

~~(4) The seller shall deliver the tobacco product, or cause the tobacco product to be delivered, to the address displayed on the valid form of government identification provided by the purchaser. The seller shall deliver the tobacco product, or cause the tobacco product to be delivered, by a postal or package delivery service method that either limits delivery to the purchaser and requires the purchaser to sign personally to receive the delivery or requires the signature of an adult at the purchaser's address in order to deliver the package. No delivery described under this section may be made to any post office box.~~

~~(5) The seller shall either (A) remit to the Board of Equalization all applicable taxes on the sale or (B) include on the outside of the cigarettes to a person in California provided that either of the following conditions is met:~~

~~(1) All applicable California taxes on the cigarettes have been paid.~~

~~(2) The seller includes on the outside of the shipping container for any tobacco product cigarettes shipped to a resident in~~

1 California from any source in the United States ~~a prominent an,~~
2 externally visible, and easily legible ~~label that includes all of the~~
3 ~~following information:~~

4 ~~(A) A notice that the package contains tobacco products and a~~
5 ~~description of the contents, including the size and number of~~
6 ~~containers.~~

7 ~~(B) A notice that the package is not to be delivered to a minor~~
8 ~~and that a signature by the addressee or an adult is required for~~
9 ~~delivery.~~

10 ~~(C) A notice that the purchaser is responsible for any applicable~~
11 ~~California taxes on the tobacco products.~~

12 ~~(d) For the purposes of enforcement of this section, the acts of~~
13 ~~the United States Postal Service or other common carrier when~~
14 ~~engaged in the business of transporting and delivering packages~~
15 ~~for others, and the acts of a person, whether compensated or not,~~
16 ~~who transports or delivers a package for another person without~~
17 ~~any reason to know of the package's contents, are not unlawful and~~
18 ~~are not subject to civil penalties.~~

19 ~~(e) Any person who violates this section is subject to the civil~~
20 ~~penalties set forth in subdivision (a) of Section 22958. A notice~~
21 ~~located on the same side of the shipping container as the address~~
22 ~~to which the package is delivered stating as follows:~~

23
24 *"IF THESE CIGARETTES HAVE BEEN SHIPPED TO*
25 *YOU FROM A SELLER LOCATED OUTSIDE OF THE*
26 *STATE IN WHICH YOU RESIDE, THE SELLER HAS*
27 *REPORTED PURSUANT TO FEDERAL LAW THE SALE*
28 *OF THESE CIGARETTES TO YOUR STATE TAX*
29 *COLLECTION AGENCY, INCLUDING YOUR NAME AND*
30 *ADDRESS. YOU ARE LEGALLY RESPONSIBLE FOR ALL*
31 *APPLICABLE UNPAID STATE TAXES ON THESE*
32 *CIGARETTES."*

33
34 ~~(d) The Attorney General or a city attorney, county counsel, or~~
35 ~~district attorney may bring a civil action to enforce this section.~~

36 ~~(f) section against any person, firm, corporation, or other~~
37 ~~entity that violates this section and, in addition to any other~~
38 ~~remedies provided by law, the court shall assess a civil penalty in~~
39 ~~accordance with the following schedule:~~

1 (1) A civil penalty of not less than one thousand dollars
2 (\$1,000) and not more than two thousand dollars (\$2,000) for the
3 first violation.

4 (2) A civil penalty of not less than two thousand five hundred
5 dollars (\$2,500) and not more than three thousand five hundred
6 dollars (\$3,500) for the second violation.

7 (3) A civil penalty of not less than four thousand dollars
8 (\$4,000) and not more than five thousand dollars (\$5,000) for the
9 third violation within a five-year period.

10 (4) A civil penalty of not less than five thousand five hundred
11 dollars (\$5,500) and not more than six thousand five hundred
12 dollars (\$6,500) for a fourth violation within a five-year period.

13 (5) A civil penalty of ten thousand dollars (\$10,000) for a fifth
14 or subsequent violation within a five-year period.

15 (e) This section does not prohibit any lawful sale of a tobacco
16 product that occurs by means of a vending machine.

17 (f) Nothing in this section shall relieve the seller of cigarettes
18 from any other applicable requirement of state law relating to the
19 sale or distribution of cigarettes.

20 (g) The provisions of this section are severable. If any
21 provision of this section or its application is held invalid, that
22 invalidity shall not affect other provisions or applications that can
23 be given effect without the invalid provision or application.

24 SEC. 3. Section 1021.10 is added to the Code of Civil
25 Procedure, to read:

26 1021.10. Notwithstanding any other provision of law, in an
27 action brought in the name of the people of the State of California
28 against any person for failure to comply with Chapter 10A
29 (commencing with Section 375) of Title 15 of the United States
30 Code, otherwise known as the “Jenkins Act,” the court, to the
31 extent permitted under federal law, shall award fees and costs,
32 including reasonable attorney’s fees, to the people if the people
33 succeed on any claim to enforce the Jenkins Act. Any attorney’s
34 fees awarded under this section shall be in addition to any other
35 remedies or penalties available under all other laws of this state.